BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

HAROLD B. and BERNIECE H. STOUT; and LUWAYNE and ESTHER STOUT, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 89-99 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of the denial of an application to appropriate groundwater from the Starzman Lake Drainage in Okanogan County, came on for hearing on March 23, 1990, in Wenatchee, Washington, before the Pollution Control Hearings Board: Wick Dufford, presiding, and Judith A. Bendor, Chair.

Thomas Benner, Attorney at Law, appeared for appellants. The respondent was represented by P. Thomas McDonald, Assistant Attorney General. Kay Stevens of Steichen & Hewitt reported the evidentiary hearing. Closing argument was heard by telephone conference call on

material varies in depth from a few feet to 250 feet below land surface. The deepest layer of till, overlain by up to four feet of soil, is at the southern end of the basin.

III.

There are no perennial surface water streams in the basin. Water is found primarily in a water table aquifer contained within the overburden of till and soil above the bedrock. Small lakes and ponds scattered through the drainage are surface expressions of the water table. The groundwater of the basin drains southward into the Brewster Flat.

IV.

In May of 1979, Mildred A. Hancock applied to the Department of Ecology for a permit to appropriate groundwater for domestic supply and the irrigation of 40 acres in Section 25, Township 31 North, Range 24 East, Williamette Meridian -- near the southern end of the Starzman Basin.

Later, in that same year, Ms. Hancock sold the property to the Stouts, the appellants in the instant case. The Stouts, believing water rights were not a problem, drilled a well in October of 1979.

Some year and a half later, on April 16, 1981, an assignment of the application for a groundwater permit was executed by Ms. Hancock (then Mildred Hancock-Rhay) in favor the the Stouts. This document, however, was not then filed with the Department of Ecology.

V.

In January, 1983, Ecology decided to grant the Hancock application and mailed its decision to Ms. Hancock at her last known adddress, requesting that permit fees be submitted. The permit fees were never tendered, and efforts to reach Ms. Hancock by telephone were unsuccessful. Absent the fees, Ecology issued no permit and cancelled the application. The cancellation apparently took place some time in 1983, but the precise date is not clear on this record. The Stouts were not notified.

VI.

In 1984, Ecology's inspectors, having noted fluctuations in the water levels in the Starzman Basin, became concerned that the area might be either over-appropriated or approaching this condition. In a meeting with an Ecology inspector, the Stouts became aware of this concern and also learned for the first time that there appeared to be a problem with their right to take water from the well on the subject property.

In response, on April 5, 1984, the Stouts filed Application No. G4-28428, which is the subject of the instant case. The Stout application sought permission anew for the irrigation of the 40 acres covered by the cancelled Hancock application.

VII.

With Application No. G4-28428, the Stouts also forwarded to

Ecology a copy of the 1981 assignment of the Hancock application. Ecology's records bear a handwritten notation showing that someone had advised the agency of the sale of the realty to the Stouts prior to the cancellation of the Hancock application. However, Ecology had no notice of the assignment of that application until long after it was cancelled.

VIII.

Ecology's concern for the availability of water in the Starzman Basin led to the initiation of a study of the matter in 1985. At the time, the agency had eight or nine pending applications for appropriations from the basin (including the Stouts') and were worried that the demand posed by this potential increase in use would result in overdraft of the resource. The agency was also aware of increasing residential development near the south end of the basin. Since domestic use of groundwater up to 5,000 gallons per day is exempt from the permit system, there was apprehension over additional use of the aquifer not accounted for in Ecology's records.

Accordingly, all applications were held until the study was completed.

IX.

In March of 1987, Ecology produced a study entitled "Evaluation of the Water Resources within the Starzman Lake Watershed." The study was the product of both field work and review of agency records and

represented the joint efforts of agency's technical staff in hydrogeology and the inspectors working in the permit process.

Relevant findings of the study were that:

a) Recharge of the water table aquifier within the basin appears to be derived exclusively from precipitation which falls within the watershed boundaries.

b) Average annual precipitation falling on the drainage is approximately 11.7 inches.

c) Of the 11.7 inches of precipitation, only an estimated 1.2 inches per year contriutes to recharge.

d) The estimate of present potential demands on the resource by users is within three percent of the calculated annual recharge, a figure within the margin of error of the calculated recharge.

X.

Based on these findings, the study concluded that no additional groundwater was available for allocation within the basin. The underlying assumption was that allocations beyond the annual recharge figure would result in groundwater mining and eventually cause the basin to go dry.

XI.

The study did, however, note the existence of storage in the aquifer. Dividing the drainage into five different sub-areas based on the average thickness of the unconsolidated overburden, the study

estimated a storage capacity of around 12 times the average annual recharge or approximately 13,000 acre feet.

XII.

After the study was issued, Ecology waited two years before acting on any of the pending applications. The additional wait was to see if any allocations in the permit stage, and not yet actually appropriated, would fail to develop and be cancelled. After the two years, only 60 additional acre feet became available through this process.

XIII.

Ecology ruled on the pending applications in 1989, evaluating them in the order of their priority. Adopting a slightly more optimistic view than expressed in the study, the agency approved the two oldest applications. However, the rest of the pending requests were denied on the basis that the drainage is already fully appropriated.

XIV.

The conclusion of full appropriation rests on a discretionary determination to restrict the volume of water appropriated to a level approximating the average annual recharge. The purpose of this limitation is to prevent the mining of the aquifer.

In many drainages, Ecology has limited appropriations to as little as 50% of the average annual recharge. A greater level of

appropriation has been allowed here because the storage available provides a reserve seen as adequate to protect exisiting users in extended drought conditions.

XV.

The denial of the Stouts' application was issued June 30, 1989. The Stouts' appeal was filed with this Board on August 2, 1989. The appeal was given our cause number PCHB No. 89-99.

The appellants' contentions fall into two categories: one, that Ecology is wrong on its facts and two, that the Hancock application should have given them priority in relation to other pending applications.

XVI.

We were not persuaded by appellants' factual assertions. We find it more likely than not that recharge of the Starzman Basin aquifer is limited solely to precipitation on the overlying land. Water from the Brewster Flats Irrigation District would have to migrate upgradient to recharge the Starzman Basin. Moreover, the weight of evidence is that any other out-of-basin source for groundwater in the aquifer is precluded by granite barriers.

We find that the 11.7 inch average annual precipitation figure is an appropriate estimate, derived by accepted methods of estimation in the absence of site-specific data.

We find also that the 1.2 inch figure for average annual recharge

is a reasonable number, obtained again by means commonly employed and relied upon by hydrogeologists. The availability of real data for basin outflows from the two basins to the west (in many ways similar to the Starzman) enhances the credibility of this facet of the study.

We have no basis for disagreeing with the conclusion that return flows from irrigation in the basin are a negligible contributor to the aquifer. Accordingly, we do not believe that the average annual recharge calculation, determined by multiplying the 1.2 inches times the basin area, underestimates the total average annual recharge.

Furthermore, we think that the level of authorized withdrawals has been appropriately calculated and, given the unknown potential for exempt domestic water usage, the demand side of the equation appears reasonable.

XVII.

The Stouts do not reside on the subject property and have never used the well there for the irrigation of crops.

XVIII.

Any Conclusions of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board reaches the following

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the parties and the subject matter. Chapters 43.21B, 90.44 and 90.03 RCW.

II.

The appeal before this Board relates to Ecology's action on Application No. G4-28428, an application filed on April 5, 1984. By that date, the Hancock application, initiated some five years earlier, had already been cancelled. No appeal of the cancellation was made to this Board. In the context of the present appeal filed in 1989, we perceive of no means by which the instant application can be made to relate back to the priority date of its cancelled predecessor.

III.

We express no opinion on the record made in this case in connection with the doctrine of exhaustion of administrative remedies, as it might relate to an action elsewhere to set aside the cancellation of the Hancock application.

We note, however, that the basic statute in providing for the assignment of permit applications requires the approval of such transfers by Ecology. Filing of assignments with the agency is an explicit statutory requirement. RCW 90.03.310.

Moreover, the reason a separate assignment of an application is needed is that the interest involved is not part of the associated realty. See Madison v. McNeal, 171 Wash. 669 (1933). Property rights associated with the use of water become apurtenant to the land only after the appropriation is perfected. RCW 90.03.380. Thus, notice that the realty has been transferred does not impart notice that the

personal property interest in any water rights application has also been transferred.

IV.

Appellants argue that Ecology should permit them to go ahead and appropriate and, then, turn to regulation if a problem becomes apparent.

Appellants are, of course, correct that the state of knowledge about water resources in the Startzman Basin is not perfect. But given a state of knowledge, risks appear high that further appropriations would result in groundwater mining to the detriment of prior appropriators. The water code is designed to anticipate and prevent this kind of trouble. Otherwise the application investigation system would have no function. All uses could be allowed to commence and then simply be regulated on the basis of priority. Those who invested in water developments and guessed wrong would just have to suffer the consequences. The statutory permit system is intended to head off such problems before they occur. In large measure, the state water agency's task is prevention, not enforcement. See Black Star Ranch v. Eckerich, PCHB 87-19 (1988).

V.

The circumstances surrounding instant application are closely analogous to those in Jensen v. Department of Ecology, 102 Wn.2d 109, 685 P.2d 1068 (1984). There the determination of a permit

application was governed in large measure by the outcome of a detailed study of water availability carried out by experts. Their work was based on a reasonable level of data acquisition and research, leading to educated estimates of supply and demand. Such an effort was recognized as an appropriate and adequate means for carrying out Ecology's investigative responsibilities on an individual application. We conclude that Ecology's investigation in this case satisfied the requirement of RCW 90.03.290 to "investigate all facts relevant and material to the application."

VI.

Ecology's decision here is also governed by the four substantive criteria of RCW 90.03.290: (1) beneficial use, (2) availability of public water, (3) non-impairment of existing rights, and (4) the public interest. Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

The problem in the instant case is most simply described as one of water availability, although, as often happens, there is an overlap with the existing rights and public interest categories. What is involved is a discretionary decision, legislatively assigned to Ecology's good judgment. See Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983); Peterson v. Department of Ecology, 92 Wn.2d 306, 596 P.2d 285 (1979).

VII.

Fundamentally, the discretionary decision in the case at bar concerns the question of mining water. RCW 90.44.130 requires Ecology to regulate the use of groundwater so that a "safe sustaining yield" is maintained for prior appropriators and "overdraft" is avoided.

This does not mean that stored groundwater may never be taken. It means, rather, that the appropriation of waters in excess of annual recharge can be allowed only under circumstances where the ability of existing rightholders to fully satisfy their rights by reasonable means can be guaranteed. Generally this will require a very large aquifer with a substantial quantity of water in storage, managed through a cautious program of drawdown that does not completely exhaust the resource. See Shinn & Masto v. Department of Ecology, PCHB No. 648, et al (1975). Chapter 173-130A WAC.

Under the facts of the instant case, however, we apprehend no reason to substitute a different judgment for the discretionary determination made by Ecology. Here the aquifier is small in area and largely shallow in depth. The aquifer does not contain extensive storage and lies in an area of limited precipitation even in the best of years. The decision to limit withdrawals to the average annual recharge is only prudent in the circumstances. Senior appropriators are to be protected even when the average is not reached.

VIII.

In short, we conclude that Ecology was correct when it concluded as to Application No. G4-28428 that water is not available for the proposed use because Starzman Lake Drainge Basın is fully appropriated and that existing water resources are needed to satisfy existing rights.

IX.

Havıng once been the recipıent of a groundwater applicatıon assignment, appellants mıght now again consider the possibilities of purchase of the water rights they seek. Moreover, they might also give thought to filing yet another application for the same project, to improve their position in line to receive water whıch might become available in the future (i.e., water not appropriated by those under permıt or forfeited for non-use by those wıth perfected rights).

X.

Any Finding of Fact which is deemed a Conclusion of Law ıs hereby adopted as such.

From these conclusions of Law the Board enters the following

ORDER

The denial of Application No. G4-28428 is sustained.

DONE this 18th day of May, 1990.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

JUDITH A. BENDOR, Chair